Petition

81-307

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ALEXANDER L. STEVAS,
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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

CLAUDE K. WEST,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether an air traveler is "seized" within the meaning of the Fourth Amendment where officers accost him after he has passed a security checkpoint, hold their shields out with their arms upraised, ask to speak with him, ask for his ticket and identification, advise him that they think he is carrying drugs, ask to search his suitcase, and fail to advise him that he need not stop or comply with their requests, and where the operative state law makes it a crime to refuse an officer's lawful request for identification.

2. Whether the seizure of an air traveler's suitcase based only on the presence of "reasonable suspicion" can be upheld as a "minimal intrusion" where that seizure entails a one-hour delay before a drug-detecting dog can be summoned and where the traveler, then boarding a flight headed to his home city, will foreseeably lose the use of his personal effects for at least several hours and most probably overnight or, alternatively, will be deprived of his personal liberty for an extended period of time should he choose to miss his flight and remain with his suitcase until it is released.

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MISCELLANEOUS.

3 W. LaFave, Search and Seizure 53-55 (1978) 9n
Op. Atty. Gen. (Fla.) 072-256, Aug. 10, 1972 11n

Claude K. West petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Opinions Below.

The opinion of the court of appeals (Appendix A hereto) is reported at 651 F.2d 71 (1981). The opinion of the district court (Appendix B hereto) is reported at 495 F.Supp. 871.

Jurisdiction.

The judgment of the court of appeals was entered on June 16, 1981 (Appendix C hereto). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision Involved.

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case.

On January 15, 1980, Claude West was traveling by air from Miami to his home in Burlington, Vermont via Boston. West was approached and asked for identification and information first in Miami and then in Boston by law enforcement officers having no reasonable suspicion that he was engaged in criminal activity. When the questioning of West in Boston produced information giving rise to a reasonable suspicion but not probable cause to believe that West's suitcase contained contraband, the officers seized the suitcase, notwithstanding their knowledge that West's flight home to Burlington was about to depart. The "alert" of a detector dog one hour later furnished the probable cause needed to obtain a warrant to search West's suitcase. Cocaine was discovered and West was arrested upon his arrival in Burlington.

West was indicted for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).* He moved to suppress the physical evidence seized from his suitcase on the ground that the warrant was unlawfully based on the fruits both of an investigative stop not supported by reasonable suspicion and of a seizure of his suitcase not supported by probable cause. That motion was denied in the district court and West was thereafter convicted in a jury-waived trial on stipulated facts.** On appeal West sought reversal of the denial of his motion to suppress on the same grounds as he raised below. The First Circuit affirmed West's conviction.

The facts surrounding the stop in Miami and the seizure of West's suitcase in Boston are virtually undisputed.*** Based

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* Federal jurisdiction was based on 18 U.S.C. § 3231.

** West was sentenced to a term of three years' imprisonment followed by a special parole term of three years.

*** The statement here is confined to facts either found by the district court judge or conceded by the government's witnesses to be true.

on observations which were later held not to give rise to a reasonable suspicion of criminality, two officers of the Dade County Department of Public Safety on duty in Miami International Airport decided to approach West and ask him to produce identification and answer questions. They waited until West had passed through the security detector at the Delta terminal and then approached him. The officers, dressed in plain clothes, held up their shields with their hands raised and palms outstretched. They identified themselves and asked West to produce his plane ticket and some identification. West did so, and his papers were in order.

The officers told West they thought he might be carrying cocaine. West consented to a search of his boots, and the officers asked West for consent to search his suitcase. West asked the officers whether he was required to permit a search of his luggage. When the officers advised him that he could refuse such a search, West did so.

At no time did the officers advise West that they did not have the authority to stop him or that he was not obliged to stop, to speak with them, or to furnish documentation. West testified that he believed the officers had the authority to stop and question him. In fact, the only request with which he declined to comply was the one where he was advised that he was free to refuse: that he permit a search of his luggage.

West proceeded to Boston, where Drug Enforcement Administration ("DEA") agents awaited his arrival. Although the agents had been told by telephone of the circumstances of the officers' encounter with West in Miami, the agents took no steps to arrange for a drug detector dog to be present. The agents observed West check in for a soon-to-depart flight bound for Burlington, which they knew to be his home. They followed him, observed what they believed was behavior evidencing unusual nervousness, and approached him in the departure area as the plane was boarding. They too requested West's ticket and identification and they too interrogated

West. As a result of this questioning, they acquired a reasonable suspicion that West had contraband in his suitcase. As the government has conceded, the agents still lacked probable cause.

The agents told West that they were taking his suitcase and that they intended to summon a detector dog from the United States Customs Service to sniff the suitcase. The agents knew that West's flight to Burlington would depart before they would return his bag, and they had no idea when the next flight to Burlington was scheduled to depart. In fact, the next direct flight to Burlington would not leave until over 4½ hours later. The agents gave West the option of missing his flight and remaining with the bag until they saw fit to return it, but West chose to continue his journey home, since under neither circumstance would the agents permit him any control over the bag until they had transported it to their office, telephoned the Customs Service, waited for the dog and its handler to arrive, and conducted their examination. As described above, only after an hour from the time the agents seized West's bag did a detector dog arrive and provide the agents for the first time with probable cause to believe that the suitcase contained contraband.

Reasons for Granting the Writ.

This case presents for review two important questions relating to police-citizen encounters in which the police lack probable cause to believe that a crime has been or is being committed. The first question is whether the restraint of a person's liberty which results not from an officer's use of actual force or express assertion of authority but from the officer's conduct in circumstances reasonably implying that an

officer is exercising authority constitutes a "seizure" of that person required to be justified by the presence of reasonable suspicion. The second is whether the seizure of the luggage of an air traveler proceeding home and his deprivation of the use of his personal effects foreseeably for many hours or even overnight constitutes a "minimal intrusion" justifiable by mere "reasonable suspicion" under the standards of *Terry* v. *Ohio*, 392 U.S. 1 (1968).

These questions raise important issues of law where the decisions of the circuit courts are in conflict, where the questions have not been clearly resolved by this Court, and where the resolution of these issues is essential both to effective law enforcement and to the protection of the Fourth Amendment rights of citizens. Recent decisions have spawned a police practice whereby officers having not even a reasonable suspicion of crime take advantage of their apparent authority to stop citizens in airports, obtain their identification and ticket information, and to interrogate them concerning whether or not they are engaged in crime. If as a result of this prodding, the officers obtain responses giving them merely a reasonable suspicion of criminality, the officers seize the traveler's luggage for purposes of having it examined by a dog, notwithstanding that this seizure's effect is to either cause the traveler to miss his flight or to lose his luggage as he continues his journey. Given the frequency with which law enforcement officials now use these tactics,* partly as a result of recent decisions, and given the substantial impact of these practices on a large number of presumably law-abiding travelers (since no cause exists for the original encounter and only reasonable sus-

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* *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980); *United States* v. *Viegas*, 639 F.2d 42 (1st Cir.), *cert. denied*, 101 S.Ct. 2046 (1981); *United States* v. *Place*, 498 F.Supp. 1217 (E.D. N.Y. 1980); *United States* v. *West*, 651 F.2d 71 (1st Cir. 1981); *United States* v. *Jodoin*, 2 Mass. Supp. 84 (D. Mass. 1981).

picion supports the luggage seizure), it is essential that this Court clearly state whether or not these practices comply with the Fourth Amendment.

I. Review by This Court is Required to Establish the Scope of the Fourth Amendment's Application to Police-Citizen Encounters Not Constituting Arrests.

Early Authority.

In *Terry* v. *Ohio*, *supra*, and subsequent cases, this Court established that detentions of citizens by police, even for a brief period of time, constitute seizures of the person subject to the Fourth Amendment and require a showing of at least reasonable suspicion to be lawful. This Court has held police restraints to constitute seizures where officers have asked a pedestrian to identify himself and explain his presence in a particular location, *Brown* v. *Texas*, 443 U.S. 47 (1979); where a policeman in a cruiser stopped an automobile for a random license and registration check, *Delaware* v. *Prouse*, 440 U.S. 648 (1979); where a border patrol stopped an automobile inside a fixed checkpoint for a brief questioning, *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); and where a policeman approached a parked car, tapped on the window and asked the occupant to open the door, *Adams* v. *Williams*, 407 U.S. 143 (1972). In no case has this Court examined police conduct claimed to be a restraint on an individual and found it not to constitute a seizure within the meaning of the Fourth Amendment. In *Terry* v. *Ohio*, however, the Court noted (392 U.S. at 20 n.16):

> Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only

> when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

and the Court articulated (392 U.S. at 16) the general principle that:

> whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

Lower courts applying the *Terry* definition of a seizure have held that the test for determining whether a person has been seized is whether that person reasonably believes himself free to leave. Applying this test, these courts have repeatedly found seizures in circumstances where no actual force was used or authority expressly exercised. Individuals in numerous cases have been held to be restrained when officers approached, identified themselves, and asked to see the individual's ticket or identification.* Indeed, the Second Circuit in *United States* v. *Buenaventura-Ariza*, 615 F.2d 29, 31 n.3 (2d Cir. 1980), observed:

> An "investigative stop" ordinarily occurs when federal narcotics agents approach an individual, identify them-

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* *United States* v. *Roundtree*, 596 F.2d 672, 674 n.1 (5th Cir.), *cert. denied*, 444 U.S. 871 (1979); *United States* v. *Rico*, 594 F.2d 320 (2d Cir. 1979); *United States* v. *Canales*, 572 F.2d 1182, 1184 (6th Cir. 1978); *United States* v. *Coleman*, 450 F.Supp. 433, 439 (E.D. Mich. 1978); *United States* v. *Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980). *See also Adams* v. *Williams*, 407 U.S. 143 (1972); *United States* v. *Palmer*, 603 F.2d 1286 (8th Cir. 1979) (where officers' noncoercive behavior was found to be an exercise of authority).

selves, and ask the suspect to produce identification or explain his action.

Finally, in *Brown* v. *Texas*, 443 U.S. 47 (1979), the Supreme Court *unanimously* held that a single officer who had gotten out of his car and had asked a pedestrian subject to identify himself and to explain what he was doing in a particular location thereby seized the subject's person for purposes of the Fourth Amendment. We submit that *Brown* and the lower court decisions cited above applied in a realistic way the *Terry* test that a person is seized when he reasonably believes that he is not free to walk away.

United States v. *Mendenhall*.

In *United States* v. *Mendenhall*, 446 U.S. 544 (1980), the government argued that the Sixth Circuit Court of Appeals had erred in finding that the defendant there had been seized. This Court as a whole did not reach the seizure issue, although Justices Stewart and Rehnquist voted to reverse based in part on their belief that no seizure had taken place. The opinion of Justices Stewart and Rehnquist restated the *Terry* standard; however, it went on to itemize factual considerations which should be looked to in determining whether an individual reasonably believes himself free to leave.*

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* Justice Stewart in his opinion said (446 U.S. at 554-555):

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with

The listing of these factual considerations has caused some lower courts, including the First Circuit in this case,* to hold, in effect, on the authority of Justice Stewart's opinion in *Mendenhall*, that people only reasonably believe themselves restrained where the police use actual force or expressly exercise their authority, and that courts may disregard circumstances which implicitly suggest to a reasonable person that an officer is exercising his authority.

These cases ignore the common sense manner in which people respond to police authority. They also conflict with *Brown* v. *Texas* and the lower court decisions prior to *Mendenhall* cited above where implicit exercise of authority was sufficient to constitute a seizure. Finally, they conflict with cases decided since *Mendenhall* which recognize that there is no holding in *Mendenhall* on the seizure issue, and that officers may restrain people's freedom by taking advantage of circumstances effectively conveying compulsion. *United States* v. *Hill*, 626 F.2d 429, 433 n.6 (5th Cir. 1980); *United States* v. *Robinson*, 625 F.2d 1211, 1215 (5th Cir. 1980); *United States* v. *Bowles*, 625 F.2d 526, 530-531 (5th Cir. 1980); *United States* v. *Patino*, 649 F.2d 724 (9th Cir. 1981). *See also United States* v. *Santora*, 619 F.2d 1052 (5th Cir.), *cert. denied*, 101 S.Ct. 360 (1980); *Stuart* v. *Florida*, 389 So.2d 4 (Fla. App. 1980), *cert. denied*, 49 U.S.L.W. 3947 (June 23, 1981), *citing*, *State* v. *Frost*, 374 So.2d 593 (Fla. App. 1979). In *Patino*,

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the officer's request might be compelled. See Terry v Ohio, supra [392 U.S.], at 19, n 16; Dunaway v New York, 442 U.S. 200, 207, and n 6; 3 W. LaFave, Search and Seizure 53-55 (1978). In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. [footnote ommitted.]

* *United States* v. *Fry*, 622 F.2d 1218, 1221 (5th Cir. 1980); *United States* v. *West*, 651 F.2d 71 (1st Cir. 1981); *United States* v. *Place*, 498 F.Supp. 1217, 1222-1223 (E.D. N.Y. 1980).

supra, the Ninth Circuit held explicitly that *Mendenhall* failed to provide clear guidance for the disposition of that case. Relying in part on *Brown* v. *Texas*, *supra*, the court noted that there are gradations of restraint beyond actual force or express assertion of authority. It upheld a lower court finding that an air traveler had been seized where officers approached the traveler, displayed their identification, politely requested to speak with her, asked to see her ticket and identification, and told her that she fit the profile characteristics of a drug courier. The court considered various factors as significant in upholding the lower court's finding that the traveler was not free to walk away: (1) the fact that she was asked for her ticket and identification immediately upon being stopped; (2) her language problem; (3) the fact that she was not told that she could refuse to stop and answer questions; (4) her status as an alien; and (5) that the officers communicated that they regarded her as a suspect for investigation.

Thus, we submit that this is an issue which cries out for clarification by this Court, particularly since Mr. Justice Powell on behalf of himself and two concurring justices in *Mendenhall* noted (446 U.S. at 560 n.1):

> For me, the question whether the respondent in this case reasonably could have thought she was free to "walk away" when asked by two government agents for her driver's license and ticket is extremely close.

United States v. *West*.

This case squarely presents the issue left open by *Mendenhall*. The facts either as found by the district court or which are undisputed show that, as in many of the other cases cited above, West was approached by officers holding their shields upraised, was asked to produce a ticket and identification, was

interrogated, and was asked to consent to a search. In addition, three other factors not present in *Mendenhall* have particular significance to West's reasonable belief that the officers were exercising authority. First, the officers waited to approach West until he was leaving the security checkpoint. Second, the officers stated to West that they thought he was carrying cocaine. And finally, the operative law in Florida posed a substantial risk that a failure to comply with the officers' requests would result in his arrest.*

These circumstances made it plain that the officers were exercising their authority and not making a request for voluntary assistance. The confrontation was adversarial in nature. That the officers made their requests in polite terms only demonstrates the norm of police practice: because it is so apparent that officers are exercising their authority they can ordinarily gain compliance with their requests without the use of force or an express invocation of official authority. Nowhere do persons more routinely expect authority to be exercised than at airport security gates. For example, an official at the security checkpoint can effectively halt a traveler by simply asking, "Would you mind walking through the detector again, sir?" No traveler in this circumstance could reasonably believe that he is free to continue onto his airplane and that he may disregard the request unless he chooses to accommodate the official. Likewise, under no circumstances does a person more reasonably believe that he is not free to board an airplane leaving the jurisdiction than when officers advise him that they think he is carrying drugs. To hold in these circumstances that West was not seized is to say that West reasonably believed

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* Fla. Stat. Ann. §§ 843.02, 843.06, 856.021, 901.18; *Op. Atty. Gen.* (Fla.) 072-256, Aug. 10, 1972; *United States* v. *Warren*, 499 F.Supp. 667 (S.D. Fla. 1980); *State* v. *Ecker*, 311 So.2d 104, 110 (Fla. 1975). *See also*, *Brown* v. *Texas*, *supra*.

that officers stating that they thought he was carrying drugs (and therefore having authority to stop him) would fail to do their duty by declining to exercise that authority and by allowing West to proceed unchecked with his crime.

This decision thus should be reversed not only to correct error here but to eschew the fiction that persons complying with implicit but clear official authority are doing so voluntarily, and to make clear that the conduct of police in routinely detaining air travelers is subject to the safeguards of the Fourth Amendment.

II. Review by This Court is Needed to Establish What Seizures of Property are Minimal Intrusions Allowable without Probable Cause.

This Court has consistently held that a seizure of the person based on reasonable suspicion and not probable cause is lawful only where that seizure is *minimally intrusive*. *See, e.g.*, *Dunaway* v. *New York*, 442 U.S. 200 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). In *Dunaway*, *supra* at 210, this Court stated that

> Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope.

The Court in *Dunaway* noted that the intrusions that it had permitted on a showing of less than probable cause were "brief and narrowly circumscribed." 442 U.S. at 212. It noted that the investigative stops at issue in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), "usually consumed less than a minute and involved a brief question or two." 442 U.S. at 210-

211. Indeed, in describing the authority to seize the person conferred by the presence of reasonable suspicion, the Court in *Brignoni-Ponce* said (422 U.S. at 881-882):

> The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause*. [Emphasis added.]

Similarly, in *Adams* v. *Williams*, 407 U.S. 143, 147 (1972), this Court held that *Terry* permitted

> A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information . . ..

See also, United States v. *Chamberlin*, 644 F.2d 1262 (9th Cir. 1980).

Except in *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), a case whose applicability the Court limited to its specific facts, this Court has never considered what seizures of property may be effected in the absence of probable cause, nor are we aware of any other federal case decided prior to June of 1980 which permitted a seizure of property on less than probable cause in a non-border context.

The rationale of *Terry* v. *Ohio* would suggest that, like seizures of the person, some seizures of property are so minimally intrusive as to be allowable where an officer has reasonable suspicion that the property contains contraband. The decision below, however, departs from the law of this Court in two important respects. First, it effectively held that an indi-

vidual's interest in the possession and use of his property is so unsubstantial that the seizure of his suitcase for hours or days while he is traveling home by air can be characterized as minimally intrusive. In so doing, it followed *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980), and its previous decision in *United States* v. *Viegas*, 639 F.2d 42 (1st Cir.), *cert. denied*, 101 S.Ct. 2046 (1981), two other cases in which individuals' rights to the use and possession of their property were discounted as insignificant. At the same time, its decision conflicted with the general principle set forth by this Court in *Katz* v. *United States*, 389 U.S. 347, 350 n.4 (1967), and by lower courts in *United States* v. *Hunt*, 496 F.2d 888 (5th Cir. 1974), and *Parish* v. *Peyton*, 408 F.2d 60 (4th Cir.), *cert. denied*, 395 U.S. 984 (1969): even where no search is conducted the seizure of property is a substantial intrusion required to be justified by probable cause. *See, also, United States* v. *McCain*, 556 F.2d 253 (5th Cir. 1977), where the detention of an air traveler's luggage, even in the absence of any other restraint, was held to be a sufficient restriction on the traveler's personal freedom to constitute custody for *Miranda* purposes.

The decision below also employs an analysis that conflicts with this Court's decision in *Dunaway* v. *New York*, 442 U.S. 200 (1979). In *Dunaway* the state asked the Court to abandon its position that the only seizures supportable by a showing of less than probable cause are seizures that are minimally intrusive. Instead, the state asked the Court to adopt an analysis that permitted varying gradations of intrusion depending upon a balancing of the officer's level of suspicion and the seriousness of the suspected crime. The Court refused to adopt such a balancing test, saying (442 U.S. at 214):

> For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of

precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

In the decision below the court of appeals effectively employed the "reasonable police conduct under all circumstances" test that the Court rejected in *Dunaway*.

This issue thus merits review by this Court so as: (1) to eliminate the conflict between *West*, *Klein*, and *Viegas* on the one hand and *Dunaway*, *Peyton*, and *Hunt* on the other; (2) to indicate the Fourth Amendment protection against unreasonable seizures of *property*; and (3) to check the erosion in the lower courts of the Fourth Amendment probable cause standard into a nebulous balancing test.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 80-1727

UNITED STATES OF AMERICA,
APPELLEE,

v.

CLAUDE K. WEST,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BEFORE GIBSON,* *Senior Circuit Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

June 16, 1981

CAMPBELL, *Circuit Judge*. Claude West was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). His contention on appeal is that the

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* Of the Eighth Circuit, sitting by designation.

district court erred in denying his motion to suppress the cocaine seized from his suitcase by Drug Enforcement Administration (DEA) agents at Logan Airport in Boston.

There was testimony at the suppression hearing from which the court could find the following facts: West arrived at the airport in Miami on the morning of January 15, 1980, checked in for a flight to Boston, and made a reservation for a connecting flight to Burlington, Vermont. Two Dade County Public Safety Department officers, their suspicion aroused by West's appearance and conduct,[1] approached him after he had passed through the metal detector and started walking down the concourse. He responded to their questions in a cooperative manner, showing them identification and permitting a search of his boots, but refusing to permit a search of his suitcase. West terminated the conversation himself, telling the officers to "keep up the good work" and leaving to board his flight. The officers alerted DEA agents in Boston, who awaited West's arrival there, observed his conduct,[2] and approached him while he waited for his flight to Burlington. Twice in the course of his conversation with the agents, West told them (falsely, as the agents knew) that his suitcase had been searched in Miami. Asked about this a third time, he recanted and said that it had not. The agents requested his consent to search the suitcase, and West refused. The agents then told West that they were going to summon a narcotics detector

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[1] Officer Facchiano testified that West "appeared somewhat ill at ease," "continually looked around," and did not set his suitcase on the floor while waiting in line; that he did not check his suitcase; that his suit was "somewhat frayed" as if he had slept in it; that his eyes were "peaked and red"; and that he appeared to have a day's growth of beard.

[2] DEA agent Sampson testified that West disembarked from his flight from Miami, walked to the gate for his Burlington flight, checked in, went to the men's room, came out, stood looking up and down the corridor about three times in either direction, and then returned to the gate area and sat down.

dog to sniff the suitcase and that he could either wait with the suitcase (thereby missing his flight) or go on to Burlington. He chose the latter. The dog arrived and alerted to the suitcase, indicating the presence of drugs. The agents then obtained a warrant, searched the suitcase, and found 20 ounces of cocaine.

I.

West presents two arguments on appeal. First, he argues that the encounter with the officers in Miami was a seizure of his person which, under *Terry* v. *Ohio*, 392 U.S. 1 (1968), could be justified only by "reasonable suspicion" of criminal activity, which the officers lacked. Since the Miami encounter led the DEA agents to stop him in Boston, he argues that the cocaine was obtained as a result of this encounter and should therefore be suppressed.

The standard for determining whether a seizure of the person has occurred has been stated as, "If in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J.), 560 n.1 (Powell, J., concurring). It can, of course, be maintained that one might always wonder if he were really free to leave when approached and questioned by an identifiable law enforcement officer. On this premise, any approach, even the most casual, would arguably be a "seizure."[3] Few courts, however, have taken such a reductionist view of the free-to-leave standard. Rather, the cases have found a seizure only

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[3] In the present case, as the government points out, West terminated the conversation himself, indicating that he, in fact, did feel free to leave at the moment when he did so.

where the police have engaged in some "show of authority" which could be expected to command compliance, beyond simply identifying themselves as police. *United States* v. *Mendenhall*, 446 U.S. at 553; *Terry* v. *Ohio*, 392 U.S. at 19 n.16.

In *Terry* v. *Ohio* the Court found that a seizure occurred when the officer "took hold of [the suspect] and patted down the outer surfaces of his clothing." *Id.*, at 19. The Court stated that

> Not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

Id., at 19 n.16. The Court "assumed" that no seizure occurred before the officer applied physical force. *Id.*, at 19 n.16. *See United States* v. *Mendenhall*, 446 U.S. 544, 553 (this assumption appears "entirely correct").

Similarly, in *Brown* v. *Texas*, 443 U.S. 47 (1979), upon which West relies, the Court found a seizure "when the officers detained appellant for the purpose of requiring him to identify himself." In that case, the police approached the defendant in an alley and requested identification; when he refused, they frisked him, arrested him, and took him to the police station. The Court had no need to decide at what precise moment the officers "detained" Brown, since it was clear that a seizure did occur at some point; but a fair reading of *Brown* in the light of *Terry* does not suggest that the Court found a seizure before force was used. *United States* v. *Mendenhall*, 446 U.S. at 556 (no seizure in *Brown* up to the point at which Brown was frisked and arrested.)

In *United States* v. *Mendenhall*, 446 U.S. at 554, Justice Stewart gave the following examples of the kinds of circum-

stances that would indicate a "show of authority" such as to constitute a seizure:

> the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

The district court in this case found that none of these nor any comparable circumstances existed, and that West failed to prove any other display of authority by the officers which would indicate a seizure.

On appeal, West relies on the particular location of the encounter: just beyond the metal detector. He argues that this particular location, in the context of the commonly known and accepted security procedures of airports, carries a strong suggestion of the exercise of authority. But there was evidence from which the court could find that the officers approached West only after he had passed through the metal detector without the buzzer sounding and had retrieved his suitcase and taken several steps. The officers were dressed, it could be found, so as to make them readily distinguishable from airport security personnel. And West, in fact, eventually did leave, on his own initiative. *See* note 3, *supra*. Under these circumstances, we cannot say that the court erred in failing to infer from the location of the encounter that West felt constrained not to leave.[4] The district court's conclusion that no seizure occurred in the Miami encounter was not clearly erroneous.

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[4] West cites *United States* v. *Bowles*, 625 F.2d 526 (5th Cir. 1980) and *United States* v. *Santora*, 619 F.2d 1052 (5th Cir. 1980), as recent cases finding a seizure under circumstances like these. *Bowles* is distinguishable from this case in that there the agent "passed his quarry, held out his credentials and turned to face defendant, blocking his path and stopping him from pro-

As no seizure occurred, we do not consider whether the Miami agents had such a reasonable suspicion that West was engaged in criminal activity as would have permitted a seizure.

II.

West's second contention is that the detention of his suitcase in Boston was unlawful because it was not based on probable cause. The district court supportably found that by the time they detained the suitcase the agents in Boston reasonably suspected West of criminal activity. West contends that the temporary detention of his suitcase while he was between flights was so substantial an intrusion on his privacy as to require probable cause rather than merely reasonable suspicion. We rejected a very similar claim in *United States* v. *Viegas*, Nos. 80-1233, 80-1361, slip op. at 6 (Jan. 8, 1981), *cert. denied*, _____ U.S. _____, 49 U.S.L.W. 3821 (May 5, 1981). West argues that this case differs from *Viegas* in that West was continuing on another flight, while Viegas had concluded his air travel, so that the delay and inconvenience necessarily imposed by the detention of the suitcase was greater here. This may be so, although the difference does not seem to us as great as West makes out. In any case, the difference is not of sufficient degree to require a different result. Given the information the agents had at the time they detained the suitcase, particularly West's false statement that it had been searched, and given the lack of effective alternatives available to the agents

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ceeding further." *Id.*, at 532. In *Santora*, the court found a seizure on facts similar to these, but then found that the agents had reasonable suspicion to justify the seizure. Given the latter holding, the former was not strictly necessary to the result in that case. To the extent that *Santora* represents a view of the test for seizure different from that we have expressed here, we decline to follow it.

under the circumstances, and the strong likelihood that West, now fully alerted, would take immediate steps to dispose of any contraband located in the suitcase, the agents' action in detaining the suitcase for investigation was reasonable.

Affirmed.

Appendix B.

United States District Court,
D. Massachusetts.
Sept. 5, 1980.

United States of America
v.
Claude K. WEST.
Crim. No. 80-51-G.

MEMORANDUM AND ORDER DENYING MOTION TO SUPPRESS

GARRITY, District Judge.

This case came on for pretrial hearing on the defendant's objections to the Magistrate's recommendation, dated July 21, 1980, that defendant's motion to suppress be denied. At the hearing before the Magistrate, only the Government presented its evidence on the motion to suppress. For reasons unclear to us, defendant was permitted to reserve his right to present rebutting evidence until after the Magistrate issued her findings and recommendations on the basis of the Government's evidence. On August 22, 1980, at the hearing both on defendant's objections to the Magistrate's report and on the motion to suppress, we first received defendant's evidence and then heard arguments from both parties on the pending motion. Our ruling on the defendant's motion is based on a combination of the record developed before the Magistrate and the testimony presented to us on August 22. See *United States* v. *Raddatz*, (1980) _____ U.S. _____, 100 S.Ct. 2406, 65 L.Ed. 2d 424.

At the close of arguments at the August 22 hearing we dictated in open court our findings of fact and conclusions of law

with respect to the search of the defendant in Miami. Some of those findings are repeated in this memorandum. We then invited counsel to file briefs, predicated upon our oral findings, with respect to the events that unfolded after the defendant landed in Boston from Miami. For reasons and on findings of fact stated herein and in open court, we deny defendant's motion to suppress.

Miami Encounter

The defendant West was first observed by two officers of the Public Safety Department in Miami while he waited in line to purchase a ticket. It was mid-morning, the defendant wore a wrinkled suit, carried a medium-sized bag, and appeared to the officers to be looking around nervously. Based on West's behavior and appearance, and on his conversation with an airline clerk overheard by one of the officers, the two Miami officers approached West after he passed through the security x-ray machine. They identified themselves and asked West for his driver's license and airline ticket, which they examined and returned. In the course of the ensuing confrontation, the details of which are only partly disputed by the parties, the officers told West they thought he might be carrying drugs, in particular cocaine; West's boots were searched with his consent, turning up nothing; he refused the officers' request to search his bag; and he then continued on his way, boarding a flight for Boston.

While the defendant was en route to Boston, the Miami officers checked with the airline and learned that West had paid for his ticket in cash (which could include personal check) and that he left no call back phone number. They also ran West's name through a computer index of persons arrested for drugs or suspected in drug investigations. The index showed no record of the defendant. The agents then called Drug Enforce-

ment Administration (DEA) agents in Boston, to whom they recounted details of their encounter with West, including the fact that he had refused to consent to a search of the bag.

Boston Encounter

Immediately upon deplaning at Logan Airport the defendant looked around the arrival area and there spotted the Boston based DEA agent Robert Sampson. The defendant went directly to the departure gate of his connecting flight to Vermont (followed by Sampson), checked in, and then went to the men's room. As he left the men's room, West was observed by the agents to pause at the door, look up and down the concourse, and after a minute, move on. When he returned to the departure gate, Sampson and another agent approached him and asked for identification, which he produced. West explained he was coming from Miami where he had visited a friend. When the agents suggested he might have drugs in his bag, West volunteered that two agents had already stopped to question him in Miami. They pressed him further about the Miami search and West twice stated that the Miami officers had searched his bag, finally admitting on the third inquiry that they had not.

The agents next asked West if they could look in his bag, adding that he had the right to refuse their request. When the defendant refused to consent to a search of his bag, the agents told him that they would keep his bag long enough to have a specially trained narcotics detecting dog brought over from Customs. He was given the choice of staying in Boston with the bag or leaving on his Vermont flight without it. He chose to leave without the bag, and the agents brought it back to their office to await the narcotics dog. When the dog arrived (about one hour after West was first stopped by the agents at Logan) it sniffed the bag and "alerted," indicating the pres-

ence of narcotics. The agents then applied for and were issued a search warrant on the strength of an affidavit that recounted details of the Miami and Boston encounters and the alert by the narcotics dog. The search of the bag turned up twenty ounces of cocaine, which is the subject of this suppression motion. West was met by other agents when he arrived in Vermont and they arrested him after learning the results of the Boston search.

Conclusions of Law-Miami

[1] Considering all the attendant circumstances of the Miami encounter, we concluded that West was not "seized" in Miami within the meaning of the Fourth Amendment. Accordingly, we held that the Miami agents did not have to supply an articulable and reasonable suspicion of wrongdoing to justify stopping the defendant, and that no violation of the Fourth Amendment occurred in Miami. *See United States* v. *Mendenhall*, 1980, _____ U.S. _____ at _____, 100 S.Ct. 1870, at 1874-1876, 64 L.Ed.2d 497; *Terry* v. *Ohio*, 1968, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889.

Our application of the *Mendenhall* case to the facts here presented was fully developed in the findings and conclusions we dictated in open court at the August 22 hearing. In deciding whether the defendant had been seized, we employed the test described in *Mendenhall*, *viz.*, whether a reasonable person under the circumstances "would have believed that he was not free to leave." *Mendenhall*, *supra*, _____ U.S. at _____, 100 S.Ct. at 1877. The Supreme Court gives substance to this definition by citing examples of the circumstances that establish a seizure. In our view these examples without question distinguish West's encounter with agents in Miami from a true seizure under the Fourth Amendment.

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be

> the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance might be compelled.

Id., at _____, 100 S.Ct. at 1877. The Court contrasts these examples with a description of the stop of the respondent in *Mendenhall*, a detainment the Court held did not constitute a seizure.

> The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. . . . In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.

Id., at _____, 100 S.Ct. at 1877.

The case at bar, in our opinion, is *a fortiori*. None of the indicia of a seizure cited as examples in the *Mendenhall* opinion was present. The similarities between the Miami encounter and the events described in *Mendenhall* are self-evident, and they need no further elaboration. We move on, therefore, to consider the events surrounding the encounter in Boston.

[2] In Boston, our attention shifts from what happened to West to what happened to his bag. There is no doubt that although West was free to leave, his bag was seized within the meaning of the Fourth Amendment. *See, United States* v. *Chadwick*, 1976, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538; *cf. United States* v. *McCain*, 5 Cir. 1977, 556 F.2d 253. The Government concedes, and we agree, that up to the time West's bag was sniffed by the specially trained dog, no probable cause existed to believe that the bag contained drugs or any other contraband. The Government instead characterizes the holding of the bag in Boston as akin to an investigative stop, which was justified by a reasonable suspicion that the bag contained contraband. After the dog "alerted" on the bag, reasonable suspicion turned into probable cause to search for drugs, and on that basis, the Government contends, a search warrant was validly obtained and executed.[1]

[3] We consider first whether the seizure of West's bag for up to one hour while agents waited for the narcotics dog was so limited an intrusion that it can be fairly termed an investigative stop. If the intrusion was of such a nature that it exceeded the narrow scope of the exception defined by the *Terry* line of cases, *see, Dunaway* v. *New York*, 1979, 442 U.S. 200, 208-09, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 743, the search would be permissible only if supported by probable cause, which it was not. On the other hand, even if the detention of the bag was nothing more than an investigative stop, the Government still bears the burden of showing that when the bag was diverted in Boston, the Boston agents had a reasonable

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[1] The defendant has not pressed his *pro forma* objection to the adequacy of the Government's affidavit, after the dog sniffing, to show probable cause for issuance of the search warrant.

suspicion of criminal activity, justifying the seizure. *See United States* v. *Jeffers*, 1951, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59, *United States* v. *Short*, D.C.Cir., 1978, 570 F.2d 1051, 1055.

[4] We observe first that the seizure of a person's things should be viewed in a different light from the seizure of a person. A search or stop that might be impermissibly intrusive when done to a person, may still be permissible if limited to the person's possessions. The effect on one is not entirely independent of the other, however. For example, where an officer retains a suspect's driver's license and registration, the suspect cannot lawfully operate his automobile and the effect on his personal liberty is more like that of an arrest than an investigative stop. *United States* v. *Miller*, 1 Cir. 1978, 589 F.2d 1117, 1127. Similarly, where a suspect was free to leave the scene of an interrogation only if she was willing to abandon her luggage, the effect on her freedom of action was enough to trigger the protection of a *Miranda* warning. *United States* v. *McCain*, 5 Cir. 1977, 556 F.2d 253, 255.

West faced something of the same dilemma when told by the Boston agents that they would keep his bag for examination by the narcotics dog. If he waited until the dog arrived he would miss his plane home to Vermont; on the other hand, his bag may have contained important personal effects he could not afford to leave behind. Taken as a whole, however, the circumstances of this case do not in our opinion warrant analyzing the detention of West's bag as anything more intrusive than an investigative stop. Competing interests are at stake here. In our view, the inconvenience to West of waiting for his bag to be forwarded on the next flight to Vermont (his final destination) must yield to the practical necessities of law enforcement agents engaged in the difficult job of controlling drug traffic through airports. *See generally, United States* v. *Klein*, 7 Cir. 1980, 626 F.2d 22 (airport detention of suitcase);

United States v. *Van Leeuwen*, 1970, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (detention of first class mail). *Cf. Dunaway* v. *New York*, *supra*, 442 U.S. at 208-09, 99 S.Ct. at 2254. Under the circumstances, the intrusion upon defendant's rights of privacy and under the Fourth Amendment was brief and reasonably circumscribed. Accordingly, there was no requirement that the agents establish probable cause before detaining the bag.

Thus the lawfulness of the detention of West's bag in Boston depends upon whether the agents' communicated suspicion that the bag contained contraband was a reasonable suspicion. *United States* v. *Klein*, *supra*, at 25. Had we applied this test to the Miami encounter, we believe that facts as they had developed up to that point fell short of reasonable suspicion. In Boston, on the other hand, the agents possessed most of the same objective information known to the Miami agents, and they had a further opportunity to observe the defendant and put their suspicions to a test. The facts that West paid cash for his ticket, left no call back number, or looked disheveled, may be noteworthy, but they are innocent standing alone. His scanning of the airport when he arrived in Boston, while consistent with illegal behavior, is too subjective a clue to be a strong component of reasonable suspicion. Yet, while each fact may appear unremarkable in isolation, the cumulative effect of objectively innocent facts, viewed through the trained eye of an experienced drug agent, can still turn an officer's hunch into a reasonable suspicion. *See*, *Brown* v. *Texas*, 1979, 443 U.S. 47, 52, n.2, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357; *United States* v. *Price*, 2 Cir. 1979, 599 F.2d 494, 501; *cf. United States* v. *Brignoni-Ponce*, 1975, 422 U.S. 873, 884-87, 95 S.Ct. 2574, 2581-83, 45 L.Ed.2d 607.

[5] In our view, two additional facts tip the balance in carrying the Government's burden to justify the seizure. The first is West's refusal to consent to a search of his bag after he had

permitted a search of his boots. No doubt, West was free to withhold consent, and his refusal to permit a search of his bag is constitutionally protected. *Terry* v. *Ohio*, *supra*, 392 U.S. at 32-33, 88 S.Ct. at 1885; *Mendenhall*, *supra*, _____ U.S. at _____, 100 S.Ct. at 1876. For that reason the fact that he refused the search furnished no basis for seizing the bag. It did, however, "alert the officer to the need for continued observation." *Terry*, *supra*, 392 U.S. at 34, 88 S.Ct. at 1886. We attach significance not to the fact that West withheld consent to search his bag, but rather that he suffered the inconvenience of having his boots searched while twice refusing the no more intrusive step of searching his bag.[2]

[6] The second of the additional facts on which we rely flows from the first. When asked in Boston whether agents had searched his bag in Miami, West lied twice before admitting that they had not. The Boston agents knew he had refused the search in Miami; the lie gave them more reason to pursue their suspicion in the bag. When West twice refused permission to search his bag, despite consenting to a search of his boots, and then lied to the agents when asked again about his bag, he focused the agents' attention on his bag and brought to a head the cumulation of otherwise innocent behavior.[3] By choosing to conclude the encounter by detaining

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[2] From the testimony of the Miami agents it appears that the boot search amounted only to a pat-down of the boots' exterior. That may be less physically intrusive than a search of the bag, but when the defendant consented to the boot search he did not know how far the agents would take it. They may well have made him take off his boots, leaving him in stocking feet in the middle of the concourse. That he would consent to a boot search, foreseeably leading to a substantial physical inconvenience and public attention, but not consent to a search of his carry-on bag, is the inconsistency that piqued the agents' suspicions.

[3] Compare, for example, the inordinate attention paid by the suspect in *United States* v. *Price*, 2 Cir. 1979, 599 F.2d 494, to his one shoulder bag and his relative indifference to three other pieces of luggage. The holding in Price, however, turned ultimately on other grounds not here relevant.

only the bag, the officers' investigation was carefully limited to the one object of which they believed they had reasonable suspicion. Any other privacy interest of the defendant was thereby assured of continued protection.

In our opinion the objective facts available to the Boston agents bring this case just across the threshold of reasonable suspicion. However, taken as a whole, the events leading up to the final confrontation; the combined training and experience of the four agents involved; the need to take immediate, if limited action; and the manner in which the officers confirmed their suspicions and then concluded the investigative stop, lead to our conclusion that no violation of the Fourth Amendment occurred. Accordingly, defendant's motion to suppress is denied.

Appendix C.

United States Court of Appeals
For the First Circuit

No. 80-1727.

UNITED STATES OF AMERICA,
APPELLEE

v.

CLAUDE K. WEST,
DEFENDANT, APPELLANT.

JUDGMENT

June 16, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Clerk

Supplemental Brief

Office - Supreme Court, U.S.
FILED
OCT 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-307.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

CLAUDE K. WEST,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Supplemental Brief in Support of the Petition for Writ of Certiorari.

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No. 81-307.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

CLAUDE K. WEST,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Supplemental Brief in Support of the Petition for Writ of Certiorari.

Preliminary Statement.

In Point Two of our Petition for Writ of Certiorari on behalf of Claude West, we argued that the seizure without probable cause of West's suitcase from him at a time when he was in transit home by airplane exceeded the minimal intrusion permitted by *Terry* v. *Ohio*, 392 U.S. 1 (1968), and violated his rights under the Fourth Amendment. We further argued that review by this Court was needed to establish generally what seizures of personal property may be effected based on the presence merely of an officer's reasonable suspicion. Since the filing of our Petition, the Second Circuit has issued its decision

in *United States* v. *Place*, F.2d (2d Cir. Sept. 16, 1981) (slip op.). That decision eloquently supports the precise position taken by us in West's Petition, directly conflicts with the decisions of the First Circuit below, and demonstrates the crying need for a clear resolution of this issue by this Court. Accordingly, this Supplemental Brief is respectfully submitted, pursuant to Rule 22.6 of this Court, to bring *United States* v. *Place*, *supra*, to the Court's attention and to briefly discuss its significance to the issues raised by the Petition already filed.

Argument.

United States v. *Place*, *supra*, squarely presented the second issue raised by petitioner West here: "whether a warrantless government seizure of a person's effects for a substantial period of time upon reasonable suspicion but without probable cause violates his Fourth Amendment rights" (App. 2a).* In direct conflict with the First Circuit's decision in this case below, the Second Circuit held that such a seizure is unlawful.

In *Place*, agents of the Drug Enforcement Administration stopped the defendant at La Guardia Airport based on their own observations and on information received from officers in Miami who had questioned the defendant there. Although they lacked probable cause to believe that Place's baggage contained contraband, the agents seized the baggage and told Place that they were going to attempt to obtain a search warrant. The agents told Place that he was free to accompany them or not as he chose, and one of them provided Place with

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* A copy of the opinion in *United States* v. *Place* is attached as an appendix to this Supplemental Brief. References preceded by "App." are to pages of that appendix.

his name and a telephone number on a piece of paper. The agents took the luggage by car to Kennedy Airport, approximately 35 minutes away. There they presented the luggage to a trained detector dog. The dog's positive reaction to one of the suitcases gave the agents the probable cause which then permitted them to obtain a search warrant and to secure a quantity of cocaine from the luggage.

In considering whether the seizure of Place's luggage without probable cause was lawful, the Second Circuit recognized the seriousness of cocaine trafficking, the crime of which West stands convicted. In addition, the court considered whether seizures of the type effected in *Place* are necessary for the effective enforcement of the drug laws. The court nevertheless concluded that no exigency existed, inasmuch as, having been alerted by Miami several hours earlier, the agents could have had their dog ready to perform its task with only a minimal detention of the suspect or his effects. As noted in our Petition, the same circumstances were present in this case.

The Second Circuit then applied the teaching of this Court that the narrow scope of the *Terry* exception to the general rule requiring probable cause should be maintained. It noted that "the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property" (App. 16a), and it declined to formulate a special rule for seizures of property. The Second Circuit characterized the seizure in *Place* as a "broad intrusion" (App. 21a) and held the seizure to be unlawful in the absence of probable cause. Although it based its judgment on "factors unrelated to the particular inconvenience to the individual in the specific case before [it], concentrating on the general nature and extent of the detention" (App. 17a), the court noted as a potentially exacerbating circumstance the possibility that "the owner were about to board another plane for distant parts" (App. 16a), the circumstance that existed here.

In reaching its decision the Second Circuit relied on the general principles applicable to *Terry*-type seizures established by this Court in *Dunaway* v. *New York*, 442 U.S. 200 (1979), and elsewhere. It found *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), to be restricted to its particular facts, and it found "unpersuasive" the decisions of courts, including the First Circuit in this case, upholding as constitutional substantial detentions of baggage (App. 20a).

We submit that *United States* v. *Place* was correctly decided, that its result cannot be reconciled with the decision from which we seek review here, and that resolution of this issue by this Court is needed not only to eliminate a direct conflict between the circuits, but to provide guidance for the first time on an issue of law enforcement and personal rights that is both frequently occurring and extremely important.

Conclusion.

For these reasons and those already presented in our Petition for Writ of Certiorari, we respectfully submit that this Court should grant certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1312—September Term, 1980

(Argued May 14, 1981 Decided September 16, 1981)

Docket No. 81-1034

UNITED STATES OF AMERICA,

Appellee,

—against—

RAYMOND J. PLACE,

Defendant-Appellant.

Before:

KAUFMAN, MANSFIELD and OAKES,

Circuit Judges.

Appeal from a judgment of conviction for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), entered in the Eastern District of New York, Thomas C. Platt, *Judge* (498 F. Supp. 1217).

Reversed.

JAMES D. CLARK, Esq., Durham, NC (Spears, Barnes, Baker & Hoof, Durham, NC, of counsel), *for Appellant.*

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MANSFIELD, *Circuit Judge:*

The pivotal question raised by this appeal is whether a warrantless government seizure of a person's effects for a substantial period of time upon reasonable suspicion but without probable cause violates his Fourth Amendment rights. We hold that it does.

Raymond J. Place appeals from a judgment of conviction for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), entered in the Eastern District of New York by Judge Thomas C. Platt after denial by a Memorandum and Order, 498 F. Supp. 1217, of his motion to suppress the contents of luggage seized from him at LaGuardia Airport, and his subsequent plea of guilty with reservation of his right to appeal the ruling on his motion to suppress. Place contends that in violation of the Fourth Amendment law enforcement officers stopped him at both Miami International and LaGuardia Airports without specific articulable facts justifying a reasonable suspicion that he was engaged in unlawful activity and that they made a warrantless seizure of his

suitcases at LaGuardia Airport without probable cause. Since the warrantless LaGuardia seizure of his suitcases without probable cause was unreasonable, precluding their being used as evidence against him, we reverse.

On Friday, August 17, 1979, Place entered the Miami International Airport for the purpose of boarding a National Airlines flight to New York's LaGuardia Airport. While on line to purchase his ticket he attracted the attention of two Dade County detectives who were observing passengers in the terminal. The officers observed him scanning the area of the terminal and noticed that he appeared extremely nervous. They watched him for 20 minutes while he stood on line for his ticket and noticed that he in turn was beginning to watch them, although he pretended not to do so.

After Place had purchased his ticket and checked his bags, the detectives separated. One followed Place as he headed for the departure gate, the other went to check the name on Place's baggage. Place did not, however, proceed directly to the departure gate. Instead he walked part of the way there, turned around, walked around the waiting room in a circle while looking over his shoulder, and then stopped in a rest room.

The two detectives rejoined at this point, and, when Place came out of the rest room shortly thereafter, they followed him to the airline security checkpoint. At this point the agents proceeded to approach Place, asking him his name and requesting that he produce identification. He gave both. The detectives explained that they were investigating narcotics traffic and requested the right to examine Place's baggage. Place said that he did not use narcotics, that he did not have any in his baggage, and that the detectives were welcome to examine that baggage. Because there were only five minutes left before

Place's flight to New York, the detectives did not search the bags and bid him farewell. As they parted Place turned around and said to the officers that he had recognized that they were policemen.

This remark caused the detectives to rush to the baggage loading area and re-examine Place's bags. In so doing they noted Place's address on the bags and observed a slight discrepancy between the street numbers given on the two bags. The detectives then obtained from National Airlines the call back number Place had given it for his reservation. They called the police department of Hallendale, Florida, the town in which the baggage addresses were located, and inquired whether those addresses existed and what the address associated with the phone number was. They were informed that neither address existed but that the number was that of a third address on the same street.

On the basis of this incident and the information they had obtained, the detectives called Special Agent Gerard Whitmore of the New York office of the Drug Enforcement Agency (DEA). They informed Whitmore of the events that transpired at Miami International Airport and of the information they had obtained about Place.

Relying on this information, Agent Whitmore and another DEA agent, Alfredo Iglesias, waited for Place at the National Airlines arrival gate in LaGuardia Airport. They recognized Place among the passengers arriving at the gate from the description they had received. He was engaged in a conversation with another passenger as he and that passenger walked through the terminal. While the two walked through the terminal, Place surveyed the area around him, as he had done in Miami. Fearing that he would spot them if they continued observing him, the

agents proceeded to the baggage claim area, awaiting his arrival.

Place soon arrived near the baggage claim area, but did not enter it. Instead he stood outside, again scanning the area. When the flight's luggage arrived he entered the area. After fiddling with the handle of one bag, he picked up his two bags and walked out of the area. The two agents followed him, but were careful to avoid appearing to do so. Place walked to the TWA baggage claim area, continuing his scanning as he went. When he arrived there he used one of the telephones, apparently to call a limousine.

Agent Whitmore now decided to interview Place. He and Agent Iglesias walked up to Place and identified themselves as federal narcotics agents. Place responded by saying that he had known that the two were "cops." He then asked why he was being stopped and was told it was because, based on information from the Dade County police and on their own observations, the agents suspected him carrying narcotics. Place did not say anything and Agent Iglesias asked him if the bags he was carrying were his. He replied that they were.

At this point Place stated that a number of police at the Miami Airport had surrounded him and searched his baggage. This was contrary to what the agents had been advised by the Dade County detectives. Whitmore stated that he had understood that Place had not been searched. Placed replied that that understanding was incorrect; he had, he claimed, been searched. The agents then asked for and Place produced identification—a New Jersey driver's license and his airline ticket receipt.

Agent Whitmore now asked Place if he would consent to a search of his baggage. Place refused. Whitmore told

Place that the agents were "going to take the luggage to a neutral party, to a Federal Judge, to make a determination as to whether or not there was probable cause for a search warrant." Place was also told that he was free to accompany the agents on this trip. It was then that Agent Iglesias took the driver's license to run a computer check on it, which revealed no violations.

When Iglesias returned he again asked Place if the bags were his. Place said that the larger of the bags was definitely his but that he was unsure about the smaller because it had had his name tag on it in Miami and the tag was no longer attached. After the agents asked Place to provide the combinations of the bags' locks, which he refused to do, Iglesias picked up the bags and Whitmore gave Place a piece of paper with his office number and a 24-hour emergency number at which he could be reached. Place then ran after Iglesias and demanded that he give his name and badge number. Iglesias gave his name and said that he could be reached at the same telephone numbers.

The agents put the bags in the car and drove to Kennedy Airport, leaving at about 4:10 P.M. and arriving approximately 35 minutes later. After a delay in finding a dog handler, the suitcases were subjected to a "sniff test" by "Honey," a dog trained to detect controlled substances. At about 5:30 or 5:40 P.M. Honey reacted positively to (i.e., detected a controlled substance in) the smaller bag and neither positively nor negatively to the larger. Agent Whitmore contacted the United States Attorney's office and asked for instructions. He was told to wait until Monday morning (the day being Friday) and at that time to come to apply for a search warrant.

On Monday morning Agent Iglesias applied for a search warrant for both bags. A federal magistrate

granted a warrant for the smaller bag only on Monday afternoon. On opening that bag Agent Whitmore found bags containing 1,125 grams of cocaine. The indictment, motion to suppress, and guilty plea followed.

DISCUSSION

At the outset, review of a few relevant constitutional principles is helpful. The Fourth Amendment protects not only "persons" but their "effects" against "unreasonable" government "seizures." With rare exceptions the seizure of a person or his effects is deemed *per se* "unreasonable" unless a warrant has first been obtained from a neutral magistrate upon a showing of probable cause. *Katz v. United States,* 389 U.S. 347, 357 (1967).

"Probable cause," while not requiring evidence sufficient to convict, *Wong Sun v. United States,* 371 U.S. 471, 479 (1963), nevertheless cannot exist in the absence of sufficient evidence to lead a reasonable and prudent person to believe, not merely suspect, that a crime has been or is being committed. *Brinegar v. United States,* 338 U.S. 160, 175-76 (1949); *United Sates v. Ceballos,* ____ F.2d ____ (2d Cir. 1981), Dkt. No. 80-1420, Slip Op. 3983, 3999-4000.

Even in those rare instances where warrantless seizures are permitted, such as the "automobile exception," *Chambers v. Maroney,* 399 U.S. 42 (1970), the police must still have probable cause, *id.* at 51, but the seizure is allowed for the reason that, because of the exigencies of the situation with which they are confronted, the police cannot obtain the timely issuance of a warrant without losing the criminal or his contraband. Even in those exceptional cases the powers of law enforcement agents have been carefully restricted, see, e.g., *Robbins v. Cali-*

fornia, ____ U.S. ____, 101 S.Ct. 2841 (1981); *United States v. Chadwick*, 433 U.S. 1 (1977). Seizures for "investigatory" purposes have consistently been declared unconstitutional, see, e.g., *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975).

> " 'The requirement of probable cause has roots that are deep in our history.' *Henry v. United States*, 361 U.S. 98, 100 (1959). Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment. . . . The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule. See *Brinegar v. United States, supra*, at 175-76.
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> ". . . A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979).

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court opened a narrow exception to the foregoing principles, permitting a brief "on-the-spot" investigative stop of a person by police where probable cause did not exist but the officers were possessed of sufficient specific articulable facts to justify a reasonable suspicion that the person stopped was engaged in unlawful activity. See in accord, *Delaware v. Prouse*, 440 U.S. 648 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143 (1972); *Sibron v. New York*, 392 U.S. 40 (1968). The exception was made for the reason that upon balancing the public interest in protection from crime against the individual's right to security of his person and effects free from arbitrary interference by law officers, it was decided that the intrusion was so "minimal" in contrast to traditional arrest and seizure that a limited leeway should be permitted in the interest of law enforcement. *Dunaway v. New York, supra*, 442 U.S. at 209-11. Indeed some members of the Court (Justices Stewart and Rehnquist) were of the view that such conduct did not amount to a "seizure" as that term is used in the Fourth Amendment, *United States v. Mendenhall*, 446 U.S. 544, 551-57 (1980).

Thus the degree to which a person's liberty may be curtailed when law enforcement agents have less than probable cause is determined by balancing the "public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce, supra*, 422 U.S. at 878. *Terry* upheld the brief stop and frisking of a suspect for weapons as justified by the combined governmental interests in preventing crime and in protecting police offi-

cers confronting potentially armed suspicious individuals. *Brignoni-Ponce* upheld the stopping of an automobile and the questioning of its occupants within 100 miles of the Mexican border when reasonable suspicion existed and the procedure generally took less than a minute. 422 U.S. at 880.

Terry soon provided the principal weapon used by law enforcement authorities to curtail use of commercial airlines as a means of unlawful transportation of narcotics and other contraband. Passengers suspected of acting as couriers could now lawfully be stopped for interrogation by officers having a reasonable basis for suspecting them of criminal activity. Gradually various sets of circumstances deemed sufficiently objective and articulable in combination to justify a reasonable suspicion of unlawful activity were developed, with courts usually sympathetic toward upholding investigative stops on the basis of facts that would normally be viewed as innocent but for characterizations of government agents, including a "nervous" appearance on the part of the passenger; his arrival from a "source" city (i.e., a city described on the *ipse dixit* of drug enforcement law officers as a drug-trafficking center, without any supporting evidence); the passenger's looking "steadily ahead" after alighting from a plane; his frequently glancing sideways or backwards as if searching for someone; his deplaning as the first of the alighting passengers; his deplaning last; his cash purchase of his ticket rather than through a credit card; his appearing to be a person of Hispanic background; the "reputation" of the passenger as a narcotics dealer; and the like. Some drug enforcement agents, such as the "ubiquitous" Agent Whitmore in the present case, see *United States v. Forero-Rincon*, 626 F.2d 218, 220 n.4 (2d Cir. 1980), were recognized as

having made stops in a substantial number of past instances where their suspicions proved to be correct but without evidence as to the number of instances in which innocent passengers had been subjected by them to investigatory stops. Such airport stops, for instance, have been upheld by us in *United States v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 447 U.S. 907 (1980); *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *United States v. Price*, 599 F.2d 494 (2d Cir. 1979); *United States v. Rico*, 594 F.2d 320 (2d Cir. 1979); *United States v. Riquelmy*, 572 F.2d 947 (2d Cir. 1978); *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977). However, in *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980), we concluded that the complex of conduct viewed by Agent Whitmore in that case was "wholly insufficient to constitute 'specific and articulable' facts supporting a reasonable suspicion that [the defendants] were involved in drug trafficking," *id.* at 36. Finally, an end was put to the gradual relaxation of the factors justifying reasonable suspicion by the Supreme Court in *Reid v. Georgia*, 448 U.S. 438 (1980), where it concluded that the drug enforcement agent at the airport "could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances." *Id.* at 441.[1]

Turning to the present case, the record is clear that the drug enforcement agents did not have probable cause to

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[1] The lower court had relied on the facts

> "that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags." 448 U.S. at 441.

arrest Place or seize his baggage at LaGuardia Airport. Nervous behavior, traveling from a so-called "source city," minor errors on a baggage tag, telling an undercover officer that his identity as such was recognized by the suspect, and the other factors involved here may be abnormal, but by themselves they are clearly not enough to constitute probable cause. The district court, while stating that it would not "pass on that question" (existence of probable cause), 498 F. Supp. at 1228 n.7, erred in suggesting that probable cause existed. Indeed the government does not argue on this appeal that probable cause existed. Instead, it points to a combination of circumstances observed by law enforcement officials at the Miami and LaGuardia Airports, which were found persuasive by the district court, as providing articulable facts justifying a reasonable suspicion of narcotics trafficking.[2] Place, on the other hand, lists other circum-

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2 At Miami International Airport the following facts were relied upon:

"1. Defendant Place was departing from a 'source city.'

"2. Defendant systematically scanned the immediate area in the lobby in which he was standing and looked very closely at each person that was seated or standing in that area.

"3. Defendant noticed and paid close attention to Mr. McGavock when he left the line.

"4. Defendant stared directly at the detectives two or three times as the detectives moved around the lobby.

"5. When buying his ticket and checking his baggage, the defendant turned and looked over his shoulder to scan the lobby again.

"6. Defendant paid for his ticket in cash.

"7. After leaving the ticket counter and heading toward the gate from which he was to depart, defendant stopped for no apparent reason, turned around to look at anyone who might be behind him, and headed back to the lobby from where he had just come.

"8. Upon reaching the lobby, defendant Place walked a full circle around the lobby while looking back over his shoulder continuously to see if he was being followed." 498 F. Supp. at 1224.

The following additional facts were claimed to justify the LaGuardia Airport stop:

(footnote continued)

stances in rebuttal and argues that many of those relied on by the government are wholly consistent with innocence.[3] We find it unnecessary to resolve this issue for the reason that, even assuming that circumstances justifying an investigatory stop existed, the prolonged seizure of Place's baggage went far beyond a mere investigative stop and amounted to a violation of his Fourth Amendment rights.

Whether or not an investigative stop be labelled a "seizure," see *United States v. Mendenhall, supra,* 446 U.S. at 552, its legality depends on its brevity and relative

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"1. Defendant Place broke out into a sweat when asked about narcotics by Detective McGavock and Facchiano in Miami International Airport.

"2. Defendant Place's parting remark to the same detectives that he had spotted them in the lobby.

"3. The discrepancy between the addresses listed on the identification tags attached to defendant's baggage.

"4. The fact that neither of those addresses were known to exist.

"5. Defendant's scanning activity in LaGuardia Airport.

"6. Defendant's nervous behavior and conduct in LaGuardia Airport.

"7. Defendant's spontaneous remark on being approached by the special agents that 'I knew you guys were cops. I spotted him as soon as I got out of the Plane.' " 498 F. Supp. at 1225-26.

3 Place notes that at Miami:

1. The stop was made because the detective "had a feeling."

2. The information Place gave was accurate and the discrepancy on his luggage tags was minor.

3. The detectives had no previous knowledge that he was involved in the "drug culture."

4. There were no suspicious indications that Place had contraband hidden in his clothing.

5. He was alone and therefore there were no suspicious signals or attempts to avoid being seen with compatriots.

He further notes that at LaGuardia:

1. He was not asked to explain his scanning or his nervousness even though he was being stopped in part because of them.

2. A computer check of his driver's license revealed nothing suspicious about him.

unintrusiveness. The word "stop" implies an interruption of short duration, restricted to the immediate vicinity in which it occurred. "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope," *Dunaway v. New York, supra,* 442 U.S. at 210. Applying the principle that "[t]he greater the intrusion, the stronger the basis for the officers' action must be," *United States v. Vasquez,* 638 F.2d 507, 520 (2d Cir. 1980), the investigative stop has been upheld only where it lasted for only a few minutes or less and was limited to the locale in which the suspect was found and his baggage located. See, e.g., *United States v. Brignoni-Ponce, supra,* 422 U.S. at 880 ("usually consumes no more than a minute"). Where the suspect has been removed by the police from the spot where he was confronted to another location such as a police station, even for a short period, the conduct has been held to violate the Fourth Amendment. See, e.g., *Dunaway v. New York, supra,* 442 U.S. at 212-13, which held unconstitutional a seizure of a defendant that, while not an arrest under state law, was so intrusive as to be "indistinguishable from a traditional arrest," 422 U.S. at 212.

It has been contended that *Terry,* while applicable to investigative stops of persons, should not permit police detention of "effects," since the latter, unlike a person, "cannot resume their course independent of the owner" after the property has been temporarily seized. See Comment, *Seizing Luggage on Less than Probable Cause,* 18 Am. Crim. L. Rev. 637, 645 (1981). However, for present purposes, in addition to assuming without deciding that an investigative stop was justified, we are willing also to apply the principles of *Terry* to seizures of property. If these principles were not applicable, the warrantless

seizure of Place's baggage without probable cause would clearly violate the Fourth Amendment.

Applying the foregoing principles, it is apparent that the prolonged seizure of Place's baggage cannot be upheld as an investigative stop and will not stand constitutional scrutiny. The initial detention of Place and his baggage at LaGuardia, even if justifiable as an investigative stop, failed to yield any evidence providing probable cause for the arrest of Place or the further seizure of his baggage. No information was uncovered indicating that his baggage contained narcotics. He produced his New Jersey driver's license and his airline ticket receipt but refused, as was his constitutional right, to consent to a search of his baggage. At that point the agents were under a duty to release him and his baggage. Yet the agents, while permitting him to go, took his baggage away from him, without his consent, for a substantial period of time, removing it to another location several miles away for a period of at least 1½ to 2 hours for the admitted purpose of determining whether it contained narcotics. The question before us is whether this amounted to a reasonable warrantless investigative stop of his baggage without probable cause within the meaning of *Terry*. We hold that it did not.

There can be no question but that if the agents had taken Place himself into custody and removed him from LaGuardia to the J.F. Kennedy Airport for the purpose, through use of a trained sniffing dog, of determining whether he had narcotics on his person, this would have constituted an unlawful seizure of him in violation of his Fourth Amendment rights. *Dunaway v. New York, supra,* 442 U.S. at 216 (removal of suspect to police station for interrogation without probable cause held to be an unreasonable seizure). It may be argued that a different stan-

dard of reasonableness should apply to a detention of baggage than that of a person, on the theory that the inconvenience to the owner from seizure of his baggage may be less than when he is personally arrested without a warrant and that the intrusion is less severe. But the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property. In both cases there is an infringement of the person's freedom of action. Police custody of his person precludes him from freely moving about. Police custody of his baggage deprives him of the use of it and its contents. Both create uncertainty and anxiety on his part.

The degree of intrusion and inconvenience accompanying police seizure of a person's baggage in a particular case may vary according to the specific circumstances, including the duration of the detention and the person's immediate needs. If, for instance, the owner were about to board another plane for distant parts, or needed medicine from his baggage essential for treatment of a heart or diabetic condition, or was deprived of documents or merchandise necessary to close an important business transaction, the seizure of his baggage for any substantial period of time could be extremely harmful or even catastrophic. If, on the other hand, the person were not in any such hurry or had no such emergency personal needs, it could be argued that a greater invasion of his personal freedom or use of his property should be tolerated. But the reasonableness of a detention without probable cause should not turn on whether the person affected is a healthy vagrant with time on his hands or a busy, ulcer-ridden bank president or doctor who needs his baggage immediately to perform important pressing missions.

Such a case-by-case status test is unacceptable. Courts which have addressed the reasonableness of particular forms of detention have focused on factors unrelated to the particular inconvenience to the individual in the specific case before them, concentrating on the general nature and extent of the detention. See, e.g., *United States v. Walling*, 486 F.2d 229 (9th Cir. 1973). It is this desire for an objective standard of equal application that has led to a recommendation by the American Law Institute that a detention not based on probable cause and not consented to be limited to a maximum of twenty minutes' duration. *ALI Model Code of Pre-Arraignment Procedure* § 110.2(1) (1975). Otherwise the "investigative stop" concept would soon undermine the basic probable cause requirement, which represents a careful weighing of the conflicting interests of the government in effective law enforcement and the individual in personal freedom. The standard must be judged according to the effect its application would have upon the average innocent passenger, and not, with the aid of 20-20 hindsight, by the success it yielded in uncovering contraband in a particular case. One must take into account the probably countless other cases where the detention without probable cause did not uncover any incriminatory evidence.

In the present case, if the agents had, on the basis of a reasonable suspicion but without probable cause, merely exposed Place's baggage to a trained sniffer as he was passing through LaGuardia, this brief detention might, assuming reasonable grounds for suspicion, fall within the limits of *Terry* and its progeny. The invasion of his rights would then have been brief and minimal. Here, however, the "investigative" seizure lasted for almost two hours (from slightly before 4:00 P.M. until 5:45 P.M. when the sniffer established probable cause). Moreover,

measured by the more objective gauge of what would have occurred if probable cause had not been established, the seizure would have been protracted for at least another 35 minutes, or until 6:15 P.M., before the baggage would have been returned from JFK Airport to LaGuardia and delivered to its owner.

In our view this protracted dispossession cannot reasonably be characterized as a *Terry*-type "investigative stop." It amounted to a seizure without probable cause of Place's effects in violation of his Fourth Amendment rights. The violation was exacerbated by the high-handed procedure adopted by the agents. They did not inform Place of the place to which they were taking his baggage or how long he might be dispossessed of it. Agent Iglesias simply removed the bags without consent and Agent Whitmore gave Place a piece of paper with his office number and a 24-hour emergency number at which he could be reached. Indeed, the agents lied to Place, informing him that they were taking the baggage to a federal judge when in fact they were transporting it to JFK Airport. As far as the owner was concerned the "investigative" seizure of his baggage might last for days or weeks. This conduct is not unlike the use of Writs of Assistance which led to the adoption of the Fourth Amendment. A person is at least entitled to be informed accurately of the reason for seizure of his effects, the place to which they are being taken, and, assuming probable cause is not found, approximately when he may expect the return of his property.

In reaching our decision we have not overlooked the seriousness of the suspected offense in the present case or the danger posed by the suspect to the public, which must be balanced against the individual's right to have his personal effects free of arbitrary interference by law

enforcement officers. *Terry v. Ohio, supra,* 392 U.S. at 20-21; *United States v. Brignoni-Ponce, supra,* 422 U.S. at 878; *United States v. Mendenhall, supra,* 446 U.S. at 561 (Opin. of Powell, J.). The public interest in prevention of drug trafficking is great. *United States v. Mendenhall, supra,* 446 U.S. at 565. But the government has not adduced any evidence that intrusions of the seriousness inflicted here are essential to enforcement of our drug laws. On the contrary, the fact that the government keeps a trained drug sniffer at JFK Airport, which presumably is available for immediate scenting of baggage suspected of containing narcotics, would indicate that it should be able to maintain a similar facility at a busy airport such as LaGuardia. Indeed, having been alerted by phone calls from the detectives at Miami Airport, 2½ hours away by air, that Place was suspected of bringing drugs in his baggage, no reason has been shown why Agents Whitmore and Iglesias could not have had the sniffing dog, while Place was in transit, brought from JFK Airport to LaGuardia, ready to perform its task with minimum detention when Place arrived at LaGuardia.

The government's reliance upon *United States v. Van Leeuwen,* 397 U.S. 249 (1970), as support for the seizure of Place's baggage is misplaced. That case is clearly distinguishable. There the owner of parcels deposited them as first-class mail with the U.S. Postal Service, thereby voluntarily relinquishing custody and control over them for the indefinite period (at least a couple of days) required for forwarding and delivery. Based on specific articulable facts justifying suspicion that the packages contained contraband, postal agents detained the packages, which were already in their lawful custody, for further investigation which led to issuance of a search warrant. Unlike the dispossession of hand baggage in a

passenger's custody, which constitutes a substantial intrusion, the mere detention of mail not in his custody or control amounts to at most a minimal or technical interference with his person or effects, resulting in no personal deprivation at all. Moreover, the *Van Leeuwen* Court was very careful to point out that "[w]e only hold that on the facts of this case" a short detention of mail is reasonable; it also conceded that "[t]heoretically . . . detention of mail could at some point become an unreasonable seizure." 397 U.S. at 252-53. Under the circumstances of this case, reliance on *Van Leeuwen* is unjustified.

For these reasons we find unpersuasive the decisions of other circuits upholding on the basis of *Van Leeuwen* the constitutionality of detentions of baggage as *Terry*-type investigative stops. See *United States v. West*, 651 F.2d 71 (1st Cir. 1981); *United States v. Viegas*, 639 F.2d 42 (1st Cir.), *cert. denied*, 101 S.Ct. 2046 (1981); *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980). Moreover, in none of these cases does it appear (1) that the detention of the baggage for investigation lasted for as long a period of time as in the present case, (2) that the baggage was removed from the airport to another location without the passenger's consent, (3) that the agents concealed their plans for investigation of the baggage, or (4) that they indicated that the baggage detention would be of indefinite duration. On the contrary, in each case the agents merely asked the suspect to wait for a short period of time while a sniffing dog was brought to the scene. Although in *Viegas* that baggage was retained at the airport for a longer period because of the unavailability of the dog, the suspect there had already expressly consented to "a detector dog sniff," 639 F.2d at 44. Thus the intrusions did not approximate the seriousness of that here. As indicated above, if such expeditious procedure

had been followed in the present case the detention might then have been upheld as a permissible investigative stop. See *United States v. Bronstein,* 521 F.2d 459 (2d Cir. 1975), *cert. denied,* 424 U.S. 918 (1976). It is simply not a "temporary detention for investigative purposes" when DEA agents seize suitcases against the owner's will at an airport, load them into the trunk of a car, drive to an undisclosed (indeed, misrepresented) destination, subject the luggage to secret tests never disclosed to the owner, and make no attempt to keep the owner informed as to the progress or likely duration of the investigation. Nothing in *Terry* justifies such a broad intrusion into a traveler's Fourth Amendment rights.

The judgment of conviction is reversed.

OAKES, *Circuit Judge* (concurring):

I happily concur in the well reasoned opinion of Judge Mansfield which conforms, I believe, wholly to the Fourth Amendment law as so far enunciated by the Supreme Court.

In so concurring, however, I by no means retract or qualify the view first enunciated for this court in a border stop case, *United States v. Barbera,* 514 F.2d 294 (2d Cir. 1975), and further elaborated upon in my dissenting opinion in *United States v. Vasquez,* 612 F.2d 1338, 1352 (2d Cir. 1979), *cert. denied,* 447 U.S. 907 (1980). That view, simply stated and deriving in large part from the views perhaps best expressed by Professor Anthony Amsterdam in his Holmes Lecture, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 367 (1974), that the Fourth Amendment should be read not atomistically, but regulatorily. Such a view leads one to conclude

that in cases such as the so-called airport stop or search case here, sidestepping strict requirements of probable cause in warrantless searches or seizures should be permissible only if, as, and when the search or stop is made pursuant to duly adopted, proper, nondiscriminatory, and reasonable rules or regulations adopted by the appropriate governmental authority and subjected to appropriate judicial review. Absent such rules or regulations we are so much in the realm of the individual law officer's discretionary, subjective sense of suspicion as to permit of the arbitrariness and unbridled official caprice that led our Forebears, as Judge Mansfield suggests, to adopt the Fourth Amendment. Until better advised by higher Authority, I will continue to take what some would call a narrow view of extension of the "exception" to the general rule of probable cause set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). I am satisfied that Judge Mansfield has taken a similar view with conventional case support, and I write this concurrence only to refer to this somewhat less conventional view which nevertheless continues to find what seems to me like a receptive ear in some of the expressions in more recent Supreme Court opinions. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 661 (1979):

> To insist upon neither an appropriate factual basis for suspicion directed at a particular automobile nor *upon some other substantial and objective standard or rule* to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . . " *Terry v. Ohio, supra*, 392 U.S. at 22, 88 S.Ct. [1868] at 1880.

(Emphasis added.)

KAUFMAN, *Circuit Judge*, dissenting:

The majority holds that the detention of Raymond Place's cocaine-filled luggage, even if an investigatory stop were justified, constituted a violation of Place's Fourth Amendment rights. It takes this position because it is of the opinion that a holding to the contrary would extend *Terry* "stops" into a general search warrant. I cannot agree that the investigative stop of Place's luggage was unreasonable within the meaning of *Terry* or that affirmance of the district court's holding would produce an untenable result. Accordingly, I dissent.

The Fourth Amendment prohibits only those seizures which are "unreasonable." Although searches conducted without prior judicial approval are considered "unreasonable," *Katz* v. *United States*, 389 U.S. 347, 357 (1967), *Terry* instructs that a law enforcement official may, in appropriate circumstances, detain a person to investigate possible criminal activity without possessing either warrant or probable cause to arrest. *Terry* v. *Ohio*, 392 U.S. 1, 22 (1968). In assessing the propriety of these so-called *Terry* stops, courts must evaluate the scope of the particular intrusion. *Id.* at 17 n.15. *See Reid* v. *Georgia*, 448 U.S. 438 (1980); *United States* v. *Mendenhall*, 446 U.S. 544 (1980). Furthermore, in determining the intrusiveness of a stop, the governmental interest in deterring criminal conduct must be balanced against the individual's constitutionally protected privacy. *Terry* v. *Ohio*, *supra*, 392 U.S. at 20-21; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *United States* v. *Mendenhall*, *supra*, 446 U.S. at 561 (Powell, J. concurring).

I fail to see how the majority, after weighing the competing interests involved here, could conclude that the *Terry*-type stop amounted to a seizure in violation of

Place's Fourth Amendment rights. The public interest in holding the suitcase for a "sniff test" was compelling—detection of an individual who traffics in drugs. *See United States* v. *Mendenhall, supra,* 446 U.S. at 561 (Powell, J. concurring). Surely, the 1,125 grams of cocaine Place was carrying in his suitcase could not be regarded as an amount so insignificant as not to warrant concern. In addition, if Place had been allowed to leave with his baggage, it is likely the evidence would have been destroyed. Indeed, just such a consideration forms part of the Supreme Court's rationale for permitting a warrantless seizure in some instances involving automobiles. *See United States* v. *Chadwick,* 433 U.S. 1 (1977); *Chambers* v. *Maroney,* 399 U.S. 42 (1970).

Moreover, in answer to the agents' questions, Place falsely claimed several times that both he and his luggage had been searched in Miami, refused to admit that he owned a valise which clearly belonged to him, and suggested that the agent abandon his law enforcement duties. Coupling Place's behavior in the Miami and LaGuardia airports, conduct, we are told by experts, to be characteristic of a drug courier, with these responses reveals such a strong suspicion of illegal activity that the agents would have been remiss in their duty had they not detained Place's bags.

The majority, however, finds that a less than two-hour detention of Place's cocaine-filled luggage—not Place—outweighs even such a forceful governmental interest. Place, my brothers seem to deduce, suffered so great an inconvenience that his privacy interests were violated. I do not believe so. I must emphasize that this is not an instance of taking a person into custody, an event which must be supported by probable cause. *See Dunaway* v. *New York,* 442 U.S. 200 (1979). Neither are we dealing

with an actual search which must be grounded in probable cause. We merely must determine the propriety of detaining baggage. Furthermore, the majority seems to agree the investigatory stop of Place's person could have been justified. If this is so, the reasoning underlying their greater concern for Place's effects simply eludes me.

My brothers perhaps react so strongly not because the law calls for it, but because they are particularly offended by what they term the "high-handed procedure" of the agents. They fail to recollect that Place was offered the opportunity to accompany his bags. He refused, asserting he had pressing business elsewhere. Certainly Place may still have been inconvenienced had he gone with the agents, but the Supreme Court has suggested the appropriate alternative course of action to be followed: Place should simply have consented to a luggage search. *See Arkansas* v. *Sanders,* 442 U.S. 753, 764 n.12 (1979). Instead, he asked whether an "arrangement," a euphemism for a bribe, could be made so that he could leave with his suitcases. Moreover, inconvenience has never been the sole standard for delineating the reasonableness of an investigatory stop. Causing an automobile to pull over merely because of an erratic pattern of driving with a subsequent questioning of the driver and a search of the car's interior has been held permissible by the Supreme Court. *See Robbins* v. *California,* 49 U.S.L.W. 4906 (U.S., June 30, 1981). Surely, this is a greater intrusion on an individual's privacy and convenience than a brief detention of baggage.

The majority, moreover, ignores the critical difference between an individual's privacy interests in the contents of his suitcases as distinguished from the suitcases themselves. In *United States* v. *Chadwick, supra,* 433 U.S. at 13 n.8, the Supreme Court explicitly distinguished be-

tween these two interests by stating that a person's principal privacy interest lies not in the baggage itself, but in the contents. *Accord, Arkansas* v. *Sanders, supra,* 442 U.S. at 764. A search of the interior of the suitcase, therefore, would have been much more intrusive than temporarily removing the bags from Place's possession.

Similarly, while recognizing the importance of the privacy interest in first-class mail, the Court in *Van Leeuwen* stated that no Fourth Amendment interest was disturbed by delaying the forwarding of mail because the privacy interest was in the packages themselves; that privacy was protected until the approval of a magistrate was obtained. *United States* v. *Van Leeuwen,* 397 U.S. 249, 253 (1970). I am indeed aware of the possible difference between the privacy interest in packages placed in the mails and in luggage carried by an individual, a point the majority labors to emphasize. I do not, however, find such nebulous distinctions as persuasive as my brothers.[1] We are searching for principles to guide us by turning to *Van Leeuwen,* not *minutiae,* and it seems clear to me the Supreme Court's counsel is applicable to suitcases as well as to mail. By applying the Court's reasoning, the conclusion is inescapable that detaining Place's luggage did not violate his privacy interest.

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[1] I also remain unconvinced that decisions of other circuits which consider baggage detention a *Terry* stop are distinguishable. *See United States* v. *West,* 651 F.2d 71 (1st Cir. 1981); *United States* v. *Viegas,* 639 F.2d 42 (1st Cir.), *cert. denied,* 101 S.Ct. 2046 (1981); *United States* v. *Klein,* 626 F.2d 22 (7th Cir. 1980). The majority finds differences only through ignoring patent similarities with the situation here. My brothers, for instance, claim that the agents indicated Place's luggage would be detained for an indefinite period. In *Viegas,* the agents' comments could fairly be said to imply the same notion. *See United States* v. *Viegas, supra,* 639 F.2d at 44. Furthermore, the argument for distinction is somewhat tenuous. How could it matter that the bags were moved to another location when the majority states that dispossession itself is the cardinal fault?

I would hold, on the facts presented to us here, that the temporary detention of Place's luggage was a reasonable "stop" within the meaning of *Terry*. At the time the bags were detained there were objective and articulable facts to warrant the agents' belief that Place's bags contained contraband. This suspicion was based on the same conduct which justified the investigatory stop of Place's person. I believe we make bad law today in holding that a valise cannot be detained under the circumstances here. This, it seems to me, totally ignores the unwarranted hurdles we are placing in the path of agents engaged in the difficult task of controlling the heavy traffic in drugs.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
A. DANIEL FUSARO NEW YORK 10007
CLERK

U.S.A. v. Raymond J. Place September Term, 1980
Docket No. 81-1034 Decided September 16, 1981

Page 4851, line 7 - after "search warrant." insert new footnote call "1/".

Page 4851, bottom of page - insert the following:

> "1/ One cannot quarrel with the notion that *Terry* stops, approved by the Supreme Court, expanded the law in a manner which some seem to find unsettleing. The Supreme Court, however, ever mindful of the need to protect precious Fourth Amendment rights, safeguards them zealously. The Court, guided by the tenets of the Constitution, has thoroughly considered the constitutionality of *Terry* stops and has resolved the issue. Where the facts fit the *Terry* principles, I do believe lower courts consider the Supreme Court's mandate the governing authority."

Page 4854, line 19 - delete "brothers.[1]" and insert "brothers.[2]" in place thereof.

Page 4854, bottom of page - delete footnote numeral "1" and insert footnote numeral "2" in place thereof.

A. DANIEL FUSARO,
Clerk

ADF/hjd

Opposition

Office - Supreme Court, U.S.
FILED
OCT 31 1981
ALEXANDER L. STEVAS

No. 81-307

In the Supreme Court of the United States

OCTOBER TERM, 1981

CLAUDE K. WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was seized within the meaning of the Fourth Amendment when he was approached and briefly questioned by federal narcotics agents.

2. Whether petitioner's Fourth Amendment rights were violated when narcotics agents detained his suitcase for one hour pending the arrival of a detection dog because they reasonably suspected that the suitcase contained narcotics.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 651 F. 2d 71. The opinion of the district court (Pet. App. 8a-17a) is reported at 495 F. Supp. 871.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a) was entered on June 16, 1981. The petition for a writ of certiorari was filed on August 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the District of Massachusetts, petitioner was convicted of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. 1a-7a).

The evidence at trial showed that petitioner attempted to smuggle 20 ounces of cocaine from Florida to Vermont. On the morning of January 15, 1980, petitioner arrived at the Miami airport, where he purchased a ticket for a flight to Boston and made a reservation to continue on to Burlington, Vermont (Pet. App. 2a). Petitioner's appearance and conduct—including the fact that he kept tight hold of his suitcase and did not check it, that he was wearing a rumpled suit and had a day's growth of beard, and that he was looking around nervously—aroused the suspicion of two police officers at the airport (*id.* at 2a & n.1, 9a). After petitioner passed through the metal detector, the two officers approached him, identified themselves, and asked if he would show them his driver's license and ticket (*id.* at 2a, 9a). When the officers told petitioner they suspected that he was carrying cocaine, he permitted a search of his boots but declined to allow them to search his suitcase. Petitioner then terminated the conversation and left to board his flight to Boston (*ibid.*).

The Miami officers informed DEA agents in Boston of these events. When petitioner deplaned in Boston, the agents noticed him look up and down the concourse several times (Pet. App. 2a & n.2, 10a). The agents then approached him at the gate area and asked him for identification. Petitioner volunteered that two agents questioned him in Miami and twice stated that they had searched his bag in Miami (*id.* at 2a, 10a). When the agents, who knew this statement to be false, pressed him a third time, he admitted that his bag had not been searched (*ibid.*).

The agents then asked petitioner if they could search his bag, advising him that he had the right to refuse their request. When petitioner declined to consent to a search, the agents informed him that they would detain his bag until a trained narcotics detecting dog arrived. Petitioner was given the option of remaining with his bag or leaving it in

Boston and boarding his Vermont flight (Pet. App. 2a-3a, 10a). He chose to fly to Burlington. The dog arrived within an hour, and it alerted to the presence of drugs in the suitcase (*id.* at 2a-3a, 10a-11a). Based on this information, the agents obtained a search warrant for the suitcase. Its contents included 20 ounces of cocaine. Petitioner was arrested in Vermont (*id.* at 3a, 11a).

2. Prior to trial, petitioner moved to suppress this evidence on the grounds that the investigative contact in Miami violated his Fourth Amendment rights and that his suitcase was illegally detained in Boston. The district court found that the questioning of petitioner by Miami officers did not constitute a seizure within the meaning of the Fourth Amendment (Pet. App. 11a-12a). The court also found that the agents in Boston had reason to suspect that petitioner was carrying narcotics in his bag and hence that the temporary detention of petitioner's bag in Boston was reasonable (*id.* at 13a-17a). The court of appeals agreed in both respects (*id.* at 5a-7a).

ARGUMENT

1. Petitioner contends (Pet. 4-12) that his encounter with police officers at the Miami airport constituted a "seizure" that violated the Fourth Amendment because the officers lacked reasonable suspicion that he was engaged in criminal activity. While this contention raises an important Fourth Amendment issue, the court of appeals' decision is correct and, in our view, there is no need for this Court to consider the issue at this time.

This Court has recognized that not every contact between a citizen and a police officer constitutes a seizure within the meaning of the Fourth Amendment simply because a policeman can reasonably expect a citizen to stop when a question is posed to him. As explained in *United States* v. *Mendenhall*, 446 U.S. 544, 553 (1980) (opinion of Stewart, J.), "a person is 'seized' only when, by means of physical

force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." See also *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); *Sibron* v. *New York*, 392 U.S. 40, 63 (1968).

Here, as in *Mendenhall*, the officers' initial approach to petitioner would not have led a reasonable person to believe that he was not free to leave. Indeed, the district court found that there was no seizure here "*a fortiori*" if there was no seizure in *Mendenhall* (Pet. App. 12a). There was no show of force or authority; the officers simply approached petitioner, showed their identification, and requested to look at his ticket (*id.* at 2a, 9a). Petitioner's own actions conclusively demonstrate that he felt free to leave the officers. See *id.* at 3a n.3. Although he consented to a search of his boots, he declined to allow a search of his suitcase (*id.* at 2a, 9a). He then terminated the conversation himself, commending the officers to "keep up the good work," and boarded his flight to Boston (*ibid.*).

In *United States* v. *Mendenhall*, *supra*, a majority of this Court did not address the question whether a citizen-police contact constitutes a seizure within the meaning of the Fourth Amendment in the absence of affirmative acts by the officer that would cause a reasonable person to believe that he was not free to leave. The courts of appeals, however, generally have agreed with Justices Stewart and Rehnquist (see *United States* v. *Mendenhall*, *supra*, 446 U.S. at 551-557) that a contact such as that in *Mendenhall* or in this case does not constitute a seizure. See *United States* v. *Setzer*, 654 F. 2d 354 (5th Cir. 1981); *United States* v. *Berry*, 636 F. 2d 1075 (5th Cir. 1981), rehearing en banc granted June 16, 1981; *United States* v. *Elmore*, 595 F. 2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *United States* v. *Wylie*, 569 F. 2d 62, 66-68 (D.C. Cir.

1977), cert. denied, 435 U.S. 944 (1978). See also *Reid* v. *Georgia*, No. 36953 (Ga. Sup. Ct. Apr. 9, 1981), cert. denied, No. 81-180 (Oct. 5, 1981).

One court has found a seizure on facts similar to those here. *United States* v. *Patino*, 649 F. 2d 724 (9th Cir. 1981). The *Patino* court, however, did not reject these decisions from other circuits, and it expressly recognized the principle that not all citizen-police contacts are seizures. See 649 F. 2d at 727-728 & n.3. It distinguished the decisions finding no seizure (specifically, *United States* v. *Elmore*, *supra*) on the ground that its decision affirmed a ruling by the district court that was not clearly erroneous, whereas *Elmore* involved a defendant's appeal from an adverse ruling of the district court. 649 F. 2d at 729 n.4. While we believe that *Patino* was wrongly decided and sought rehearing en banc,[1] and while we question the Ninth Circuit's reliance on the "clearly erroneous" standard of review in that case, *Patino* nevertheless does not establish a clear conflict at this time, since it is by no means clear that the Ninth Circuit would have reached a different result from that reached by the First Circuit had it been presented with the instant case. Accordingly, the government will await further developments in the courts of appeals and is not planning to file a petition for certiorari in *Patino* unless this Court grants certiorari in another case raising the issue.[2]

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[1]Our petition for rehearing in *Patino* was denied on September 25, 1981.

[2]Petitioner's assertion of a conflict with cases other than *Patino* (Pet. 8-9) is without merit. *Brown* v. *Texas*, 443 U.S. 47 (1979), is inapposite. There the police did more than approach the defendant, ask for identification, and ask some further questions. They also frisked him, placed him under arrest for refusing to identify himself, and took him to the police station. Under these circumstances, it was clear that a "seizure" occurred; it was not necessary to determine when the seizure occurred. Because Texas law makes it a criminal offense for a person to refuse a request for identification by a police officer only if he has been lawfully stopped, an essential predicate of Brown's prosecution necessarily was that Brown was not free to leave when the police insisted that he identify

2. Petitioner also contends (Pet. 12-15) that the temporary detention of his suitcase pending the arrival of a narcotics detecting dog violated the Fourth Amendment. The court of appeals correctly rejected this claim, and, while the issue is of considerable importance, review by this Court in the absence of a conflict among the circuits is unwarranted.

Petitioner does not dispute that the DEA agents had a reasonable suspicion that his suitcase contained narcotics when they detained it. In addition to his suspicious conduct in the Miami airport of which they were notified, the agents had observed petitioner's conduct in Boston, including his false assertion that his bag had been searched by agents in Miami, which clearly gave them reasonable grounds for suspicion (see Pet. App. 2a, 10a). Rather, he contends that this suspicion, because it did not rise to the level of probable cause, did not justify the detention of his bag. This contention is mistaken.

In *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), this Court held that police were authorized to detain briefly mail packages reasonably suspected of containing contraband. When additional information established probable cause, the agents secured a warrant and searched the packages. Noting that the circumstances that gave rise to the

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himself. The Court in *Brown* simply held that, on the facts there, the police had no basis for detaining the defendant and hence no basis for applying the requirements of the state statute to him. See *United States* v. *Mendenhall, supra*, 446 U.S. at 556 (opinion of Stewart, J.).

The Fifth Circuit cases relied on by petitioner (Pet. 9) recognized the applicability of *United States* v. *Elmore, supra*, and simply held that on the particular facts involved a seizure had occurred. The Fifth Circuit has consistently applied the same test used by the court below, namely, whether a reasonable person in the defendant's circumstances would have believed that he was not free to leave. See, *e.g.*, *United States* v. *Berry, supra; United States* v. *Berd*, 634 F. 2d 979, 984-985 (5th Cir. 1981); *United States* v. *Pulvano*, 629 F. 2d 1151 (5th Cir. 1980); *United States* v. *Elmore, supra*.

officers' suspicion "certainly justified detention, without a warrant, while an investigation was made" (397 U.S. at 252), the Court explained (*id* at 252-253):

> The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures."
>
> * * * * *
>
> The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

Similarly here, petitioner's privacy interest in his luggage was not disturbed until the agents acquired probable cause to believe the suitcase contained narcotics and obtained a search warrant from a magistrate. Given the agents' reasonable suspicion that the suitcase contained narcotics, they acted reasonably in detaining it briefly to be sniffed by a dog;[3] the alternative would have been to allow petitioner to proceed with his luggage, thus creating a substantial risk of distribution of any contraband it might contain. The limited inconvenience to petitioner of having his suitcase detained temporarily was justified by the facts that gave rise to the agents' suspicion. See *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.12 (1979).[4]

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[3]The bag was detained for about an hour before the dog arrived (Pet. App. 10a).

[4]Contrary to petitioner's contention (Pet. 14), the agents fully complied with *Dunaway* v. *New York*, 442 U.S. 200 (1979). *Dunaway* held that an extended detention of a person could rise to the level of an arrest requiring probable cause. It has no application to the detention of property, where traditional notions of arrest are absent. Petitioner was not detained; he was permitted to go on his way while the agents detained his luggage to await the arrival of the detection dog.

The courts of appeals generally have recognized that luggage may be detained temporarily on reasonable suspicion that it contains contraband. *United States* v. *Martell*, 654 F. 2d 1356 (9th Cir. 1981); *United States* v. *Viegas*, 639 F. 2d 42, 45 (1st Cir.), cert. denied, No. 80-1344 (May 4, 1981); *United States* v. *Klein*, 626 F. 2d 22, 25-26 (7th Cir. 1980). As the court of appeals explained in *Klein*, the Fourth Amendment privacy interest in the contents of the suitcase, which is protected by the probable cause requirement, was not invaded by the detention but rather was safeguarded by obtaining a warrant before the search. 626 F. 2d at 26. See also *United States* v. *Chadwick*, 433 U.S. 1, 13-14 n.8 (1977); *United States* v. *Benjamin*, 637 F. 2d 1297, 1300-1302 (7th Cir. 1981). And, of course, persons wishing to avoid the inconvenience of detained luggage in such circumstances may do so by consenting to a search. The result in these cases thus constitutes a reasonable accommodation of the Fourth Amendment interests of the individual and society's need to detect and prevent serious crimes.

Recently, the Second Circuit has held, in circumstances similar to those here, that a suitcase could not be temporarily detained in the absence of probable cause. *United States* v. *Place*, No. 81-1034 (2d Cir. Sept. 16, 1981). The panel majority there distinguished the instant case, as well as *United States* v. *Viegas*, *supra*, and *United States* v. *Klein*, *supra*, on their facts. In our view, the factual distinctions identified by the panel majority do not warrant a different result, and the government is planning to seek rehearing en banc in *Place*. Since the panel decision in *Place* is not yet

final, there is at this time no conflict among the circuits that requires resolution by this Court.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

OCTOBER 1981

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[5] *United States* v. *Hunt*, 496 F. 2d 888 (5th Cir. 1974), and *Parish* v. *Peyton*, 408 F. 2d 60 (4th Cir.), cert. denied, 395 U.S. 984 (1969), on which petitioner relies (Pet. 14), do not conflict with the decision below. In *Hunt*, boxes of allegedly pornographic materials were confiscated by the FBI and taken to a magistrate to be opened. This was not a temporary detention for further investigation, however, but rather a permanent confiscation, and the court of appeals' conclusion that it was unreasonable under the Fourth Amendment is of no relevance here. See 496 F. 2d at 893. In *Parish* v. *Peyton*, a box shipped via bus was seized by the police, who obtained a warrant and searched the box. The court of appeals upheld the search. 408 F. 2d at 63.

DOJ-1981-10